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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 15, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TIANNA B.,¹

Plaintiff,

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,

Defendant.

No. 4:20-cv-5125-EFS

**ORDER RULING ON CROSS
SUMMARY-JUDGMENT MOTIONS
AND DIRECTING ENTRY OF
JUDGMENT IN FAVOR OF
PLAINTIFF**

Plaintiff Tianna B. appeals the denial of benefits by the Administrative Law Judge (ALJ). Because the ALJ failed to provide clear and convincing reasons supported by substantial evidence for discounting Plaintiff's symptom reports, the Court grants summary judgment in favor of Plaintiff, denies the Commissioner's motion for summary judgment, reverses the decision of the ALJ, and remands this matter for further proceedings.

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¹ For privacy reasons, the Court refers to every social security plaintiff by first name and last initial or as "Plaintiff." See LCivR 5.2(c).

I. Five-Step Disability Determination

A five-step sequential evaluation process is used to determine whether an adult claimant is disabled.² Step one assesses whether the claimant is engaged in substantial gainful activity.³ If the claimant is engaged in substantial gainful activity, benefits are denied.⁴ If not, the disability evaluation proceeds to step two.⁵

Step two assesses whether the claimant has a medically severe impairment or combination of impairments that significantly limit the claimant's physical or mental ability to do basic work activities.⁶ If the claimant does not, benefits are denied.⁷ If the claimant does, the disability evaluation proceeds to step three.⁸

Step three compares the claimant's impairment or combination of impairments to several recognized by the Commissioner as so severe as to preclude substantial gainful activity.⁹ If an impairment or combination of impairments meets or equals one of the listed impairments (a "listing"), the claimant is

² 20 C.F.R. §§ 404.1520(a), 416.920(a).

³ *Id.* §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

⁴ *Id.* §§ 404.1520(b), 416.920(b).

⁵ *Id.* §§ 404.1520(b), 416.920(b).

⁶ *Id.* §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

⁷ *Id.* §§ 404.1520(c), 416.920(c).

⁸ *Id.* §§ 404.1520(c), 416.920(c).

⁹ *Id.* §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

1 conclusively presumed to be disabled.¹⁰ If not, the disability evaluation proceeds to
2 step four.

3 Step four assesses whether an impairment prevents the claimant from
4 performing work she performed in the past by determining the claimant's residual
5 functional capacity (RFC).¹¹ If the claimant can perform past work, benefits are
6 denied.¹² If not, the disability evaluation proceeds to step five.

7 Step five, the final step, assesses whether the claimant can perform other
8 substantial gainful work—work that exists in significant numbers in the national
9 economy—considering the claimant's RFC, age, education, and work experience.¹³
10 If so, benefits are denied. If not, benefits are granted.¹⁴

11 The claimant has the initial burden of establishing she is entitled to
12 disability benefits under steps one through four.¹⁵ At step five, the burden shifts to
13 the Commissioner to show the claimant is not entitled to benefits.¹⁶

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16 ¹⁰ 20 C.F.R. §§ 404.1520(d), 416.920(d).

17 ¹¹ *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

18 ¹² *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

19 ¹³ *Id.* §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497–98
20 (9th Cir. 1984).

21 ¹⁴ 20 C.F.R. §§ 404.1520(g), 416.920(g).

22 ¹⁵ *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

23 ¹⁶ *Id.*

II. Factual and Procedural Summary

In November 2016, Plaintiff filed a Title II application for a period of disability and benefits. In February 2017, Plaintiff filed a Title XVI application for supplemental security income.¹⁷ Plaintiff alleged an onset date of January 26, 2017.¹⁸ She asserted disability based on sleep apnea, restless leg syndrome, arthritis, ureter tube injury, hernia, lower back pain, bilateral knee pain, posttraumatic stress disorder (PTSD), bi-polar disorder, anxiety, depression, and insomnia.¹⁹ Plaintiff's claims were denied initially and upon reconsideration.²⁰ Plaintiff then requested an administrative hearing.

In June 2019, Administrative Law Judge Mark Kim presided over the requested administrative hearing.²¹ An impartial medical expert, an impartial vocational expert, and Plaintiff each presented testimony at the hearing.²²

In denying Plaintiff's disability claims, the ALJ found as follows:

- Insured Status — June 30, 2022, would be Plaintiff's date last insured.²³

17 AR 346.

18 AR 68.

¹⁹ See AR 387.

²⁰ AR 217, 232.

21 AR 68.

22 AR 183.

23 AR 70.

- Step One — Plaintiff had not engaged in substantial gainful activity since January 26, 2017, the alleged onset date.²⁴
 - Step Two — Plaintiff had the following medically determinable severe impairments: morbid obesity, right hip osteoarthritis, abdominal wall hernia, depressive disorder, anxiety disorder, and PTSD.²⁵
 - Step Three — Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments.²⁶
 - RFC — Plaintiff had the RFC to perform light work with the following additional limitations:
 - No climbing of ladders or scaffolds, crouching, or crawling.
 - Can occasionally climb ramps and stairs, stoop, and kneel.
 - Should avoid unprotected heights.
 - Should avoid occasional exposure to extreme temperatures and excessive vibrations.
 - Work limited to simple, routine type tasks with a reasoning level of three or less.
 - Only occasional, simple changes in the work setting.

24 AR 70.

25 AR 71.

26 AR 72.

- 1 ○ Only occasional superficial interaction with the public and coworkers.²⁷
- 2 • Step Four — Plaintiff was unable to perform any past relevant work.²⁸
- 3 • Step Five — Considering Plaintiff's RFC, age, education, and work
- 4 history, Plaintiff could perform work that existed in significant numbers
- 5 in the national economy, including the following representative
- 6 occupations: marker, small products assembler II, and garment sorter.²⁹

7 In July 2019, the ALJ issued a written decision finding Plaintiff had not
8 been under a disability as defined by the Social Security Act ("the Act") from
9 January 26, 2017, through the date of the ALJ's decision, July 16, 2019.³⁰ Plaintiff
10 appealed to the Appeals Council, which denied review.³¹ Plaintiff then appealed to
11 this Court, primarily asserting that the ALJ failed to account for Plaintiff's
12 fibromyalgia, her symptom testimony, and certain medical opinions which, she
13 argues, show that she would miss more than one day of work per month on
14 average.³²

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18 ²⁷ AR 74.

19 ²⁸ AR 79.

20 ²⁹ AR 80.

21 ³⁰ AR 81.

22 ³¹ AR 1–6.

23 ³² See generally, ECF No. 27.

III. Standard of Review

³³ A district court's review of the Commissioner's final decision is limited.

The Commissioner's decision is set aside "only if it is not supported by substantial evidence or is based on legal error."³⁴ Substantial evidence is "more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³⁵ Because it is the role of the ALJ and not the Court to weigh conflicting evidence, the Court upholds the ALJ's findings "if they are supported by inferences reasonably drawn from the record."³⁶ The Court considers the entire record as a whole.³⁷

Further, the Court may not reverse an ALJ decision due to a harmless error.³⁸ An error is harmless “where it is inconsequential to the ultimate

³³ 42 U.S.C. § 405(g).

³⁴ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

³⁵ *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

³⁶ *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

³⁷ *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court “must

consider the entire record as a whole," not simply the evidence cited by the ALJ or the parties.) (cleaned up).

³⁸ *Molina*, 674 F.3d at 1111.

1 nondisability determination.”³⁹ The party appealing the ALJ’s decision generally
 2 bears the burden of establishing harm.⁴⁰

3 IV. Analysis

4 Plaintiff alleges the ALJ erred by (1) rejecting Plaintiff’s fibromyalgia as a
 5 severe impairment at step two, (2) rejecting Plaintiff’s symptom reports,
 6 (3) improperly evaluating certain medical opinions, (4) conducting inadequate
 7 analysis and failing to consider Listing 14.09D at step three, and (5) providing an
 8 incomplete hypothetical to the vocational expert at step five.⁴¹ For the reasons
 9 discussed below, the Court finds Plaintiff failed to establish that the ALJ erred at
 10 step two, but the Court finds the ALJ did err in rejecting Plaintiff’s symptom
 11 reports without providing the requisite clear and convincing reasons. Remand is
 12 required because that error impacted nearly every aspect of the ALJ’s analysis, and
 13 the Court therefore need not address Plaintiff’s remaining arguments.

14 A. Fibromyalgia: Plaintiff fails to show consequential step-two error.

15 Plaintiff asserts that the ALJ reversibly erred by dismissing her
 16 fibromyalgia as a severe impairment at step two without providing adequate
 17 explanation.⁴² The Court disagrees.

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 20 ³⁹ *Molina*, 674 F.3d at 1115 (cleaned up).

21 ⁴⁰ *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

22 ⁴¹ See generally ECF Nos. 27 & 32.

23 ⁴² See ECF No. 27 at 12–13.

1 1. Requirement to Present “Appropriate Medical Evidence”

2 At step two of the sequential process, the ALJ is required to find whether the
3 claimant suffers from any “severe” impairments by first determining whether the
4 claimant has a medically determinable impairment (MDI); then, for any MDI
5 found, the ALJ must determine whether that MDI is severe.⁴³ Importantly, to
6 establish an MDI, a claimant’s symptom reports, diagnoses, and even medical
7 opinions will not suffice; every MDI “must be established by objective medical
8 evidence from an acceptable medical source.”⁴⁴ And establishing the specific MDI
9 of fibromyalgia requires an even more particularized subset of objective medical
10 evidence.

11 To establish fibromyalgia as an MDI, the record must contain “appropriate
12 medical evidence,” which can come only from a diagnosing medical or osteopathic
13 doctor.⁴⁵ Additionally, such appropriate medical evidence “must document that the
14 physician reviewed the person’s medical history and conducted a physical exam.”⁴⁶

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16 ⁴³ 20 C.F.R. §§ 404.1520(c), 416.920(c); *id.* §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

17 See also Soc. Sec. Ruling (SSR) 85-28, *Titles II & XVI: Med. Impairments That Are*
18 *Not Severe* (S.S.A. 1985).

19 ⁴⁴ 20 C.F.R. §§ 404.1521, 416.921. For this reason, the ALJ’s error in improperly
20 discounting Plaintiff’s symptom reports did not affect the ALJ’s step-two analysis.

21 ⁴⁵ SSR 12-2p, *Titles II & XVI: Evaluation of Fibromyalgia* (S.S.A. 2012); *id.* § I. See
22 *also id.* § III.A.1; 20 C.F.R. §§ 404.1513(a), 416.913(a).

23 ⁴⁶ SSR 12-2p § I.

1 Even then, to establish fibromyalgia as an MDI, the diagnosing physician must
2 provide the three following categories of appropriate medical evidence.⁴⁷

3 First, there must be evidence showing the claimant has a “history of
4 widespread pain.”

5 [T]hat is, pain in all quadrants of the body (the right and left
6 sides of the body, both above and below the waist) and axial
7 skeletal pain (the cervical spine, anterior chest, thoracic spine,
8 or low back)—that has persisted (or that persisted) for at least
9 3 months. The pain may fluctuate in intensity and may not
10 always be present.⁴⁸

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14 ⁴⁷ See SSR 12-2p § II (“We will find that a person has an MDI of [fibromyalgia
15 (FM)] if *the physician diagnosed FM and provides the evidence we describe . . .*”
16 (emphasis added)). Read strictly, this language indicates that for any evidence to
17 be considered at this stage, its source must a medical or osteopathic doctor who did
18 *all* of the following: (1) reviewed the claimant’s medical history, (2) conducted a
19 physical exam, and (3) diagnosed the claimant with fibromyalgia. Cf. also *id.*
20 § III.A.B.1 (noting that evidence from other sources may be requested and
21 considered to determine whether the claimant has *another* MDI—not the MDI of
22 fibromyalgia—and/or to evaluate the severity and functional effects of fibromyalgia
or any other impairments).

23 ⁴⁸ SSR 12-2p §§ II.A.1, II.B.1.

1 Second, the physician's records must show EITHER

2 (A) "At least 11 positive tender points on physical examination The
3 positive tender points must be found bilaterally (on the left and right
4 sides of the body) and both above and below the waist."⁴⁹

5 OR

6 (B) "Repeated manifestations of six or more FM symptoms, signs, or co-
7 occurring conditions,⁵⁰ especially manifestations of fatigue, cognitive or
8 memory problems ('fibro fog'), waking unrefreshed, depression, anxiety
9 disorder, or irritable bowel syndrome."⁵¹

10 Third, the physician's records must also show that other disorders that could
11 cause the symptoms, signs, and/or co-concurring conditions were excluded.⁵² This

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⁴⁹ SSR 12-2p §§ II.A.2.

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⁵⁰ Signs and co-occurring conditions may include the following:

16 muscle pain, irritable bowel syndrome, fatigue or tiredness,
17 thinking or remembering problems, muscle weakness, headache,
18 pain or cramps in the abdomen, numbness or tingling, dizziness,
19 insomnia, depression, constipation, pain in the upper abdomen,
20 nausea, nervousness, chest pain, blurred vision, fever, diarrhea,
 dry mouth, itching, wheezing, Raynaud's phenomenon, hives or
 welts, ringing in the ears, vomiting, heartburn, oral ulcers, loss
 of taste, change in taste, seizures, dry eyes, shortness of breath,
 loss of appetite, rash, sun sensitivity, hearing difficulties, easy
 bruising, hair loss, frequent urination, or bladder spasms.

21 SSR 12-2p § II.B.2 n.9, n.10.

22 ⁵¹ SSR 12-2p § II.B.2.

23 ⁵² SSR 12-2p §§ II.A.3, II.B.3.

1 is because “[o]ther physical and mental disorders may have symptoms or signs that
2 are the same or similar to those resulting from [fibromyalgia].”⁵³

3 2. Plaintiff's Lack of Appropriate Medical Evidence

4 As relevant here, in discussing Plaintiff's fibromyalgia claims and diagnoses,
5 and in rejecting fibromyalgia as an MDI, the ALJ stated as follows:

6 I note that the claimant carries diagnoses of fibromyalgia
7 The record does not contain the necessary diagnostic criteria for
8 the diagnosis of fibromyalgia, and it appears to be a diagnosis in
9 response to her complaints of pain.⁵⁴

10 a. Plaintiff waived argument regarding the MDI of fibromyalgia.

11 As a preliminary matter, Plaintiff has not articulated how the evidence of
12 record satisfies the requirements set forth in Social Security Ruling 12-2p. The
13 Court “will not ordinarily consider matters on appeal that are not specifically and

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16 ⁵³ SSR 12-2p §§ II.A.3, II.B.3. “Some examples of other disorders that may have
17 symptoms or signs that are the same or similar to those resulting from FM include
18 rheumatologic disorders, myofascial pain syndrome, polymyalgia rheumatica,
19 chronic Lyme disease, and cervical hyperextension-associated or hyperflexion-
20 associated disorders.” *Id.* § II.A.3 n.7.

21 ⁵⁴ AR 72. Notably, a state-agency reviewing physician also concluded that the
22 record did not establish fibromyalgia as a medically determinable impairment. *See*
23 AR 238.

1 distinctly argued.”⁵⁵ An opening brief must contain the “appellant’s contentions
 2 and the reasons for them, with citations to the authorities and parts of the record
 3 on which the appellant relies.”⁵⁶ The Court therefore holds that Plaintiff has
 4 waived arguments as to whether the ALJ should have included fibromyalgia as a
 5 severe MDI at step two.⁵⁷ Moreover, even assuming arguendo that Plaintiff had
 6 not waived this issue, the Court finds no error here.

7 b. *The record lacks the appropriate medical evidence required to*
 8 *establish fibromyalgia as an MDI.*

9 Having reviewed the record, the Court finds it lacks the appropriate medical
 10 evidence required to establish fibromyalgia as one of Plaintiff’s MDIs. The medical
 11 and osteopathic doctors’ treatment notes of record do not reflect the requisite
 12 history of “pain in *all* quadrants” of Plaintiff’s body.⁵⁸ There is no record of a
 13 medical or osteopathic doctor independently diagnosing Plaintiff with fibromyalgia;
 14 rather, the earliest treatment notes of record show that Plaintiff had already been
 15 diagnosed with fibromyalgia—providing no indication of the original date of

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17 ⁵⁵ *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (quoting *United States v. Ullah*,
 18 976 F.2d 509, 514 (9th Cir.1992)); *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d
 19 1155, 1161 n.2 (9th Cir. 2008) (same).

20 ⁵⁶ *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 930 (9th Cir. 2003) (quoting
 21 Fed. R. App. P. 28(a)(8)(A)).

22 ⁵⁷ See *Indep. Towers*, 350 F.3d at 929–30 .

23 ⁵⁸ See SSR 12-2p §§ II.A.1, II.B.1.

1 diagnosis, identity of the diagnosing provider, or the basis for the diagnosis—and
2 this prior diagnosis was then passed along throughout the rest of Plaintiff's
3 treatment history.⁵⁹ Similarly, there are no records of a medical or osteopathic
4 doctor performing a physical exam resulting in a finding that Plaintiff had at least
5 11 positive tender points.⁶⁰ Although it is arguable that Plaintiff repeatedly
6 reported manifestations of six or more fibromyalgia symptoms, many of those
7 reports were made to non-physicians and were not included in a medical or
8 osteopathic doctor's notes.⁶¹ Finally, the record leaves unclear whether, or to what

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12 ⁵⁹ See AR 559–60 (May 2016: noting as part of Plaintiff's first appointment with her
13 new primary care provider that Plaintiff had previously been diagnosed with
14 fibromyalgia and was already seeing a pain specialist); *see also* AR 72 (ALJ noting
15 the medical expert testified that he saw the fibromyalgia diagnosis but that it
16 lacked a substantiating examination); AR 191 (medical expert's testimony).

17 ⁶⁰ See SSR 12-2p §§ II.A.2.

18 ⁶¹ See SSR 12-2p § II.B.2; *id.* § II.B.2 n.9, n.10 (providing a list of fibromyalgia
19 symptoms). *See also*, e.g., AR 75; AR 198 (Plaintiff testifying to having sunlight
20 sensitivity, but in the context of medication side effects); AR 817 (Plaintiff
21 reporting diarrhea, nausea, and vomiting); AR 857 (physician diagnosing Plaintiff
22 with irritable bowel syndrome with diarrhea); AR 879 (Plaintiff reporting dry eyes,
23 nausea, muscle aches, migraines, depression, sleep disturbances, and fatigue).

1 extent, Plaintiff's physicians sought to exclude other disorders that could have been
 2 causing Plaintiff's symptoms, signs, and/or co-concurring conditions.⁶²

3 c. *Plaintiff fails to show any error in the ALJ's fibromyalgia*
 4 *findings at step two and step three.*

5 Because the record lacks the appropriate medical evidence required by
 6 Ruling 12-2p, the Court holds the ALJ did not err in omitting fibromyalgia as one
 7 of Plaintiff's MDIs. Without fibromyalgia as an established MDI, the ALJ was not
 8 required to proceed any further under Ruling 12-2p in analyzing Plaintiff's
 9 fibromyalgia claims.⁶³ For the same reason, and contrary to Plaintiff's arguments
 10 on appeal, the ALJ was under no obligation to consider Listing 14.09D at step
 11 three.⁶⁴

12 3. *Reconsideration Starting at Step Two on Remand*

13 Although Plaintiff failed to establish fibromyalgia as an MDI at step two, as
 14 discussed below, the Court is remanding this case for further proceedings.

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 16 ⁶² See SSR 12-2p §§ II.A.3, II.B.3.

17 ⁶³ See 20 C.F.R. §§ 404.1520(c), 416.920(c); *id.* §§ 404.1520(a)(4)(ii),
 18 416.920(a)(4)(ii). *Cf. also* SSR 12-2p § II ("If we cannot find that the person has an
 19 MDI of FM but there is evidence of another MDI, we will not evaluate the
 20 impairment under this Ruling.").

21 ⁶⁴ See ECF No. 27 at 14–15 (asserting that "the ALJ's failure to consider Listing
 22 14.09D in accordance with SSR 12-2p regarding the claimant's fibromyalgia
 23 constitutes harmful legal error on its own").

1 Accordingly, and because subsequently acquired medical evidence may alter the
 2 ALJ's analysis, the Court finds it appropriate for the ALJ to begin reconsideration
 3 at step two.⁶⁵

4 **B. Plaintiff's Symptom Reports: The ALJ reversibly erred.**

5 Plaintiff argues that the ALJ failed to provide sufficient reasons for rejecting
 6 her symptom reports.⁶⁶ The Court agrees.

7 1. Plaintiff's Symptom Reports

8 Here, in his written decision, the ALJ summarized Plaintiff's symptom
 9 testimony, saying in relevant part,

10 She testified she struggles with feelings of hopelessness and she
 11 has a lot of depression and anxiety, which a lot of times prevents
 12 her from doing things she really enjoys. She feels afraid of a lot
 13 of things, such as being around a lot of people. She does not like
 14 going out in public or someone touching her. . . . She has a hard
 15 time even getting out of bed some mornings. Therapy helps her
 16 to a certain extent, but medications have not been that helpful.
 17 . . . She has a hard time with significant stress or pressure and
 18 she will just close up. . . . Cold weather and heat affects her a
 19 lot, and her anxiety and depression are worse during the winter
 20 months. . . . She testified that when she has worked, the first
 21 month is ok, but after that, her physical issues and her anxiety

17 ⁶⁵ For instance, the developed record may have more information about Plaintiff's
 18 bipolar disorder diagnosis. *Cf. e.g.*, AR 809 (July 2017: examining psychologist
 19 diagnosing Plaintiff with "Bipolar I Disorder, Moderate, Current Episode
 20 Depressed); AR 878 (Feb. 2019: "Bipolar disorder - manic episodes are not frequent,
 21 but has a lot of depression."); AR 25 (Feb. 2020: ordering Vraylar for bipolar
 22 disorder).

23 ⁶⁶ See ECF No. 27 at 15–20.

1 and depression kick in and she will start missing work. Or, she
 2 will have a manic episode if she pushes herself too far. She
 3 keeps trying to work because she needs a home to bring her son
 4 back. . . . On really bad days, she will stay in bed and go a week
 5 without showering. She will not eat, or get dressed, or brush her
 6 hair. She might end up cutting or bite herself, and sometimes
 she will black out and do things like shave herself all over, but
 she will not remember doing it. This happens at least two days
 a week when she cannot function. Her pain levels affect her bad
 mental days as well. She testified she is in so much pain all the
 time, and that increases her depression and anxiety.⁶⁷

7 2. The ALJ's Lack of Specific, Clear, and Convincing Reasons

8 Because the record does not contain affirmative evidence of malingering, the
 9 ALJ was required to provide specific, clear, and convincing reasons supported by
 10 substantial evidence for rejecting Plaintiff's symptom reports after considering the
 11 relevant factors.⁶⁸

12 a. *The ALJ improperly implied that objective medical evidence was*
 13 *required to substantiate Plaintiff's symptom reports.*

14 The ALJ concluded that Plaintiff's "medically determinable impairments
 15 could reasonably be expected to cause the alleged symptoms," but that her
 16 "assertion of total disability under the Social Security Act is *not supported* by the
 17 weight of the evidence."⁶⁹ Then, the ALJ went on to explain that "the objective

19 ⁶⁷ AR 75. *See also* AR 188–89, 193–205 (Plaintiff's hearing testimony).

20 ⁶⁸ *See* 20 C.F.R. § 416.929(c); SSR 16-3p, 2016 WL 1119029, at *7; *Ghanim v.*
 21 *Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter*, 504 F.3d at
 22 1036).

23 ⁶⁹ AR 75 (emphasis added).

1 record . . . *fails to substantiate* her subjective claims.”⁷⁰ Although medical evidence,
 2 or the lack thereof, can be a relevant factor in assessing the severity of a claimant’s
 3 symptoms, an ALJ is not permitted to discount the claimant’s symptom reports
 4 merely because they are not corroborated by the medical evidence.⁷¹ Thus, the ALJ
 5 legally erred by suggesting that objective medical evidence needed to support
 6 Plaintiff’s symptom reports regarding her established medically determinable
 7 impairments.

8 b. *The ALJ failed to explain why he rejected Plaintiff’s symptom*
 9 *reports regarding her likely number of work absences.*

10 Plaintiff testified that she had “a lot” of depression and anxiety, which would
 11 interfere with her motivation and cause her to be afraid of getting out and
 12 interacting with people.⁷² She said she could sometimes do well, and have “good”
 13 periods for about a month at a time, but she would then inevitably miss too much
 14 work, explaining, “if it’s not my depression and my anxiety, then it’s a physical
 15 issue.”⁷³ Plaintiff testified to having “really rough days” where she would stay
 16 home.⁷⁴ She stated that, unless she was having a “good” week or month, the

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 18 ⁷⁰ AR 75 (emphasis added).

19 ⁷¹ See *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Carmickle*, 533 F.3d
 20 at 1161.

21 ⁷² AR 193–94.

22 ⁷³ AR 200, 203.

23 ⁷⁴ AR 201.

1 “rough” days would render her nonfunctional two or more days per week.⁷⁵ She
 2 also described how she can sometimes push herself “pretty far,” but doing so tends
 3 to cause a manic episode, such as cutting herself, blacking out, and shaving her
 4 whole body.⁷⁶

5 Plaintiff’s symptom reports are generally consistent with her treatment
 6 history, which shows consistent reports of periods of severe depression, manic
 7 episodes, and repeatedly being fired due to excessive absences shortly after
 8 beginning a new job.⁷⁷ Also, as discussed further below, her symptom reports
 9 regarding work absences are seemingly consistent with the same medical opinions
 10 relied upon by the ALJ. As such, the ALJ erred by failing to provide any
 11 explanation whatsoever for rejecting Plaintiff’s absence-related symptom reports.

12 c. *The ALJ failed to explain how Plaintiff’s symptom reports were*
 13 *inconsistent with other evidence.*

14 An inconsistency between a claimant’s symptom testimony and other
 15 evidence of record can serve as a legitimate basis for discounting those symptom
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17 ⁷⁵ AR 203.

18 ⁷⁶ AR 201–02.

19 ⁷⁷ See, e.g., AR 199 (Plaintiff testifying to losing job in January 2017 due to
 20 excessive medical absences); AR 919 (June 2018: reporting Plaintiff was fired
 21 “because she had too many doctors note[s]”); AR 1008 (July 2017: “She was fired in
 22 January due to medical absences . . . ”); AR 992 (July 2018: “She has also lost 3 jobs
 23 due to medical since seeing this [case manager] last.”).

1 reports.⁷⁸ However, general findings regarding inconsistency are insufficient;
2 “rather, the ALJ must identify what testimony is not credible and what evidence
3 undermines the claimant’s complaints.”⁷⁹

4 The ALJ highlighted certain parts of the record that he apparently believed
5 were inconsistent with Plaintiff’s symptom reports. But the ALJ failed to explain
6 how any of the cited evidence conflicted with Plaintiff’s symptom reports, and the
7 Court finds no contradiction.⁸⁰ For instance, the ALJ pointed out that “although
8 depressed and/or anxious mood is noted in this record, she is also noted to have
9 normal mood and affect and all mental status examinations are generally within
10 normal limits.”⁸¹ Yet, the mental status examinations of record generally did not
11 address any symptoms related to Plaintiff’s medically determinable impairments of
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15 ⁷⁸ See *Rollins*, 261 F.3d at 857; *Carmickle*, 533 F.3d at 1161.

16 ⁷⁹ *Ghanim*, 763 F.3d at 1163 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.
17 1996)); see also *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring
18 that an ALJ sufficiently explain why he discounted the claimant’s symptom
19 claims).

20 ⁸⁰ See *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001) (“[T]he ALJ must
21 specifically identify the testimony she or he finds not to be credible and must
22 explain what evidence undermines the testimony.”).

23 ⁸¹ AR 76 (cleaned up).

1 depression, anxiety, or PTSD.⁸² Notably, most of the records indicating Plaintiff
2 presented with a normal mood and affect did not arise in the context of mental-
3 health treatment, meaning Plaintiff's mood and affect were unlikely to be of import
4 to the authoring provider;⁸³ the record leaves unclear how many of the normal-
5 mood notations were based on substantive evaluations as opposed to being included
6 as boilerplate language.⁸⁴ And when the focus of the visit was Plaintiff's mental
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9 ⁸² See, e.g., AR 880 (including entries for insight, judgment, orientation, and
10 memory).

11 ⁸³ See *Diedrich v. Berryhill*, 874 F.3d 634, 641 (9th Cir. 2017) (noting that courts do
12 “not necessarily expect” someone who is not a mental-health professional to
13 document observations about the claimant’s mental-health symptoms); *see also*
14 *Jajo v. Astrue*, 273 F. App’x 658, 660 (9th Cir. 2008) (not reported) (“The ALJ relied
15 on the lack of corroboration on the part of the orthopedic consultant and various
16 emergency room reports. However, the purpose of those visits was not to assess
17 [the claimant]’s mental health, and thus any lack of corroboration is not
18 surprising.”).

19 ⁸⁴ See, e.g., AR 592 (being seen for gastrointestinal issues); AR 604 (being seen for
20 hernia); AR 607–08 (treatment note for the same pain-management visit stating in
21 one section, Normal mood, affect,” and then stating in another, “The patient is
22 nervous/anxious.”); AR 880 (being seen for leg pain); AR 945 (being seen for
23 diarrhea, nausea, and vomiting).

1 health, her mood and affect were usually noted as consistent with her claimed
 2 mental-health problems.⁸⁵

3 More importantly, the ALJ failed to explain how the mixed notation
 4 regarding Plaintiff's mood and affect undermine her symptom reports. Setting
 5 aside that mental-health symptoms may be easily masked and/or overlooked if one
 6 is not specifically looking for them,⁸⁶ depression and anxiety symptoms commonly
 7 wax and wane.⁸⁷ Plaintiff testified to having good periods, but that overall, her
 8 various impairments—largely her depression and anxiety—caused her to
 9 frequently miss work when she tried to hold a job.⁸⁸ These symptom reports
 10 appear fully consistent with the longitudinal record.

11 d. *Reports of Plaintiff doing “well” on medications were not a*
 12 *legitimate basis to discount her symptom reports.*

13 The ALJ referenced notes of Plaintiff improving and doing “well” on
 14 medications.⁸⁹ When evaluating symptom reports, ALJs are directed to consider
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16 ⁸⁵ See AR 808 (“When asked to describe her mood, she states, ‘back and forth,
 17 anxious, angry and irritable, a bunch of emotions wrapped into one.’ The
 18 claimant’s affect was congruent with her stated mood.”); AR 987 (noting, “She
 19 describes her mood as depressed and presents with congruent affect.”).

20 ⁸⁶ See *Diedrich*, 874 F.3d at 641; see also *Jajo*, 273 F. App’x at 660 (not reported).

21 ⁸⁷ See *Holohan*, 246 F.3d at 1205.

22 ⁸⁸ AR 199–205

23 ⁸⁹ AR 76.

1 the effect that medication and other forms of treatment have on a claimant's
 2 symptoms.⁹⁰ Additionally, the ALJ must "sufficiently consider the duration of, or
 3 chronological fluctuation in, [the claimant]'s symptoms."⁹¹ "That a person who
 4 suffers from severe panic attacks, anxiety, and depression makes some
 5 improvement does not mean that the person's impairments no longer seriously
 6 affect her ability to function in a workplace."⁹²

7 Reports of improvement in mental health "must be interpreted with an
 8 understanding of the patient's overall well-being and the nature of her symptoms"
 9 as well as with an awareness that "improved functioning while being treated and
 10 while limiting environmental stressors does not always mean that a claimant can
 11 function effectively in a workplace."⁹³ Without more, general references to
 12 improvement are insufficient to render repeatedly reported symptoms
 13 "inconsistent" and therefore not credible.⁹⁴ To undercut a claimant's credibility
 14 and her disability claim, the improvement in question must be of the kind and
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 17 ⁹⁰ 20 C.F.R. § 416.929(c)(3)(iv)-(v); *id.* at § 404.1529(c)(3)(iv)-(v); *see Warre v.*
 18 *Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006); *Tommasetti v.*
 19 *Atrue*, 533 F.3d 1035, 1040 (9th Cir. 2008).

20 ⁹¹ *Smith v. Kijakazi*, 14 F.4th 1108, 1112 (9th Cir. 2021).

21 ⁹² *Holohan*, 246 F.3d at 1205.

22 ⁹³ *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014) (cleaned up).

23 ⁹⁴ *See Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1200–01 (9th Cir. 2008).

1 degree that brings her symptoms outside the Act's definition of disability.⁹⁵ The
2 ultimate question is "whether the severity of the problem had decreased
3 sufficiently to enable [her] to engage in gainful activity."⁹⁶

4 Here, while there are several reports of Plaintiff doing "well" or otherwise
5 improving on medication,⁹⁷ the longitudinal record is at best mixed regarding
6 overall improvement in Plaintiff's mental health; throughout her treatment
7 history, the treatment notes suggesting progress are about equal to the notes
8 indicating setbacks.⁹⁸ Even at times when the record reflects Plaintiff was taking
9 her medications regularly, she reported severe symptoms such as mania with
10 blackouts and self-cutting, as well as an inability to maintain a job due to excessive
11 absences.⁹⁹ Also, consistent with Plaintiff's testimony, the record shows that her
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14 ⁹⁵ See *id.*; *Holohan*, 246 F.3d at 1205.

15 ⁹⁶ See *Warre*, 439 F.3d at 1006 (discussing the issue of medical improvement in the
16 context of terminating benefits for a prior-established disability).

17 ⁹⁷ See, e.g., AR 860, 867, 883, 919,

18 ⁹⁸ Compare, e.g., AR 847 (noting Plaintiff was started on Buspar but did not notice
19 a difference, yet also noting "did well when she was on it"); with, e.g., AR 919
20 (reporting worsening anxiety and Buspar not helping as much with anxiety).

21 ⁹⁹ See, e.g., AR 991 (July 2018: reporting losing jobs "due to medical" and reporting
22 "mania where she blacks out, cuts, and [loses] time"); AR 897 (Sept. 2018: reporting
23 three manic episodes since July 2018).

1 providers were frequently changing her mental-health medications to find a
 2 combination that provided better and more sustained relief.¹⁰⁰

3 The record leaves unclear to what extent Plaintiff's various medication
 4 combinations improved her depression and/or anxiety, particularly her ability to
 5 maintain regular attendance over a meaningful period of time. The ALJ failed to
 6 articulate how Plaintiff's symptom reports were inconsistent with the longitudinal
 7 record, and the record lacks substantial evidence suggesting that any improvement
 8 was both sustained and of sufficient degree to enable Plaintiff to engage in gainful
 9 employment.¹⁰¹ Plaintiff's improvement is therefore not a clear and convincing
 10 reason, supported by substantial evidence, for disregarding her symptom reports.

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12 ¹⁰⁰ See, e.g., AR 605 (May 2016: Plaintiff taking Vistaril for anxiety); AR 576
 13 (Dec. 2016: Plaintiff taking Buspar for anxiety and stopping Effexor for depression
 14 and fibromyalgia and starting Cymbalta); AR 843–44 (noting “failed [C]ymbalta
 15 and gabapentin” and starting Plaintiff on Savella); AR 833 (Sept. 2017: “was given
 16 rx for [S]avella but has not noted a difference”); AR 939 (Jan. 2018: noting “seems
 17 to be doing well” on increased Savella dose); AR 919 (June 2018: noting despite
 18 taking it regularly, “[B]uspar doesn’t seem to help w/ anxiety as it used to”);
 19 AR 883 (Jan. 2019: “has been off [S]avella for over a month but feels like she is less
 20 depressed, has started taking [K]ratom w/ permission w/ her pain doctor[;] helped
 21 more w/pain and mind set”).

22 ¹⁰¹ See *Warre*, 439 F.3d at 1006; *Garrison*, 759 F.3d at 1017; *Attmore v. Colvin*, 827
 23 F.3d 872, 877–78 (9th Cir. 2016) (“Although the ALJ pointed to isolated signs of

e. The ALJ failed to explain how any of Plaintiff's activities were inconsistent with her symptom reports.

The ALJ stated that Plaintiff’s “reasonably high-functioning activities of daily living . . . are also not supportive of her allegation of total disability under the Social Security Act.”¹⁰² In support, the ALJ cites several activities but fails to address the nature, frequency, or context of such activities. For example, the ALJ cites to a July 2017 mental evaluation to say that Plaintiff reported “spending time with grandchildren, hiking with her son, throwing the football, walking on the river, [and] fishing.”¹⁰³ Yet, during that evaluation, Plaintiff merely reported that such activities had sometimes provided relief from her depression and anxiety symptoms.¹⁰⁴ Plaintiff provided consistent testimony about her symptoms and activities, and nothing in the record suggests she engaged in any of those activities more than rarely.¹⁰⁵

improvement, the ALJ could not find medical improvement on that basis unless the ups and the downs of [the Claimant]’s development showed sustained improvement.”).

102 AR 76.

¹⁰³ AR 76 (citing AR 807).

104 AR 807.

¹⁰⁵ See AR 195 (Plaintiff testifying that being around her children can “at times” help with her depression and anxiety.)

1 The ALJ also pointed to Plaintiff's activities of daily living, citing to a
2 function report submitted on Plaintiff's behalf by her adult daughter. That report
3 indicates that Plaintiff cares for her son and "cooks, does minor cleaning, laundry,
4 dishes, sweeps, shops, drives, is able to handle her own finances, reads, watches
5 TV, plays with grandchildren, [and] visits with friends and family members in
6 person and on the phone or computer."¹⁰⁶ But, the same function report cited by
7 the ALJ put caveats on many of those activities, such as explaining that the
8 Plaintiff received a lot of assistance around the house, her ability to cook is limited
9 to "sandwiches and frozen dinners, sometimes some chicken, pork chops and small
10 side[s]," she has "emotional outbursts," and "a lot of times she gets tired easily
11 playing with grandbabies."¹⁰⁷ Again, the ALJ failed to explain how any of the cited
12 activities undermine Plaintiff's claims of depression and anxiety symptoms.¹⁰⁸
13 Plaintiff's ability to occasionally engage in these basic activities, often with
14 difficulty, is not a clear and convincing reason for discounting Plaintiff's symptom
15 reports.¹⁰⁹

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18 ¹⁰⁶ AR 76 (citing AR 404–11).

19 ¹⁰⁷ See AR 404–11.

20 ¹⁰⁸ *Ghanim*, 763 F.3d at 1163 ("[T]he ALJ must identify what testimony is not
21 credible and what evidence undermines the claimant's complaints.").

22 ¹⁰⁹ See *Diedrich*, 874 F.3d at 643 ("House chores, cooking simple meals, self-
23 grooming, paying bills, writing checks, and caring for a cat in one's own home, as

1 f. *Plaintiff's unsuccessful work attempts were consistent with her*
 2 *symptom reports.*

3 The ALJ wrote that Plaintiff “has worked at different jobs throughout the
 4 relevant period, including three months of substantial gainful activity, suggesting
 5 a higher degree of functional activity than she testified to.”¹¹⁰ But as Plaintiff
 6 points out on appeal, “Plaintiff testified to continuing unsuccessful attempts to
 7 work due to a desire to regain custody of her son, but the inability to maintain any
 8 of her jobs due to excessive medical absenteeism, as she missed one to two days per
 9 week due to depression, anxiety, and physical issues.”¹¹¹ Plaintiff’s repeated
 10 terminations after short periods of employment are consistent with her symptom
 11 reports.

12 “It does not follow from the fact that a claimant tried to work for a short
 13 period of time and, because of [her] impairments, *failed*, that [she] did not then
 14 experience [symptoms] severe enough to preclude [her] from *maintaining*
 15 substantial gainful employment.”¹¹² Rather, evidence that a claimant tried to work
 16 and failed will often support allegations of disabling symptoms.¹¹³ Indeed,

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 18 well as occasional shopping outside the home, are not similar to typical work
 19 responsibilities.”).

20 ¹¹⁰ AR 76–77.

21 ¹¹¹ ECF No. 27 at 20 (citing AR 199–201).

22 ¹¹² *Lingenfelter*, 504 F.3d at 1038.

23 ¹¹³ See *id.* (citing example cases).

1 attempts at work may be “especially convincing” where, as here, the claimant
 2 attempted work due to extreme circumstances—such as trying to regain custody of
 3 a child—making “it at least as likely that the claimant tried to work in spite of
 4 [her] symptoms, not because they were less severe than alleged.”¹¹⁴

5 Plaintiff’s testimony and the record both reflect that she was repeatedly
 6 terminated from work early into a job due to excessive absences.¹¹⁵ In the context
 7 of being able to sustain gainful employment, even Plaintiff’s longest job would be
 8 considered an unsuccessful work attempt.¹¹⁶ “Where it is established that the
 9 claimant can hold a job for only a short period of time, the claimant is not capable
 10 of substantial gainful activity.”¹¹⁷ Thus, the ALJ erred by relying on Plaintiff’s
 11 unsuccessful work attempts to discount her symptom reports.

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15 ¹¹⁴ See *Lingenfelter*, 504 F.3d at 1039.

16 ¹¹⁵ See, e.g., AR 199–205, 919, 992, 1008.

17 ¹¹⁶ See 20 C.F.R. § 404.1592 (An applicant is entitled to a trial work period “during
 18 which [she] may test [her] ability to work and still be considered disabled.”); 20
 19 C.F.R. §§ 404.1574(c)(1), (3), 416.974(c)(1), (3) (noting that “work of 6 months or
 20 less [is considered] to be an unsuccessful work attempt” if the end was due to
 21 impairments); *Gatliff v. Comm’r of Soc. Sec. Admin.*, 172 F.3d 690, 692 (9th Cir.
 22 1999).

23 ¹¹⁷ *Gatliff*, 172 F.3d at 694.

g. The ALJ's finding that prescribed narcotics were inconsistent with fibromyalgia is not supported by substantial evidence.

In the section of the ALJ's decision rejecting fibromyalgia as an MDI, the ALJ stated, "Indeed, [Plaintiff] has been treated with chronic narcotics, a treatment that is not only not appropriate for fibromyalgia, but has contributed to her abdominal complaints."¹¹⁸ The Court, however, finds nothing in the record, much less substantial evidence, to support the ALJ's declaration that prescribed narcotics are "not appropriate for fibromyalgia"—in general, much less in Plaintiff's specific case. The Court therefore holds the ALJ erred in making this finding. For the reasons discussed above, this error was harmless at step two. Nonetheless, this error may have affected the ALJ's assessment of Plaintiff's credibility and symptom reports throughout the rest of the disability analysis.

h. On remand, the ALJ must articulate specific, clear, and convincing reasons, supported by substantial evidence.

Based on the above, the Court holds that the ALJ reversibly erred by failing to provide specific, clear, and convincing reasons, supported by substantial evidence for discounting Plaintiff's symptom reports.¹¹⁹ On remand, if the ALJ again discounts Plaintiff's symptoms, the ALJ shall articulate specific, clear, and

118 AR 72.

¹¹⁹ See 20 C.F.R. § 416.929(c); SSR 16-3p at *7; *Ghanim*, 763 F.3d at 1163; *Lingenfelter*, 504 F.3d at 1036.

1 convincing reasons with citations to substantial evidence.¹²⁰ General findings are
 2 insufficient because the Court cannot affirm discounting Plaintiff's symptoms for a
 3 reason not articulated by the ALJ.¹²¹ Further, when assessing Plaintiff's mental-
 4 health symptoms, the ALJ is encouraged to give due consideration to the purpose
 5 of the visit and the specialization of the provider.¹²²

6 **C. Medical Opinions: Reconsideration is warranted.**

7 Because reassessment of Plaintiff's symptom reports may influence the
 8 ALJ's analysis regarding the various medical opinions on record, reconsideration of
 9 the medical opinions is warranted as well. On remand, especially given that the
 10 vocational expert testified to anything over one absence per month being
 11 employment prohibitive, the medical opinions regarding Plaintiff's likely
 12 absenteeism rate should be of particular concern, as the ALJ failed to explain in his
 13 decision why no absence-related limitations were included in Plaintiff's RFC.¹²³

14 1. Dr. Metoyer's Opined Moderate Limitations

15 Patrick Metoyer, PhD, performed a mental evaluation of Plaintiff in July
 16 2017 and, as relevant here, opined as follows regarding Plaintiff's mental-health
 17 based limitations:

18 Due to her mood symptoms and tendency to isolate herself from
 19 others, her ability to maintain regular attendance in the

20 ¹²⁰ *Ghanim*, 763 F.3d at 1163 (quoting *Lingenfelter*, 504 F.3d at 1036).

21 ¹²¹ See *Garrison*, 759 F.3d at 1010.

22 ¹²² Cf. *Diedrich*, 874 F.3d at 641.

23 ¹²³ AR 213.

1 workplace is moderately impaired. Her ability to complete a
 2 normal work day or work week without interruption from mood
 3 symptoms is likely moderately impaired. Her ability to deal
 4 with the usual stress encountered in the workplace is markedly
 5 impaired if it involves being around other individuals, self-
 6 organization, and persistence in task.¹²⁴

7 **2. Dr. Haney's Opined Moderate Limitations**

8 Steven Haney, MD, performed a mental residual functional capacity
 9 assessment of Plaintiff in November 2017.¹²⁵ Dr. Haney opined that Plaintiff
 10 would be moderately limited in several areas, including, as relevant here, the
 11 following:

- 12 • “The ability to perform activities within a schedule, maintain regular
 13 attendance, and be punctual within customary tolerances.”
- 14 • “The ability to complete a normal workday and workweek without
 15 interruptions from psychologically based symptoms and to perform at a
 16 consistent pace without an unreasonable number and length of rest
 17 periods.”¹²⁶

18 In explaining these limitations, Dr. Haney stated that Plaintiff would have
 19 “occasional interference” from her psychologic symptoms, but they “are not seen as
 20 significantly interfering with her [concentration, pace, and persistence] and her
 21 ability to maintain work.” Yet, Dr. Haney went on to opine that there “may be a

22 ¹²⁴ AR 810.

23 ¹²⁵ AR 243–44.

¹²⁶ AR 243.

1 question of motivation,” and “attendance may occasionally be compromised.”¹²⁷
 2 Thus, Dr. Haney distinguished the persistence and concentration limitations from
 3 those relating to motivation and absenteeism.

4 3. Lack of Analysis Regarding Plaintiff’s Likely Absence Rate

5 Neither Dr. Metoyer nor Dr. Haney provided an estimate regarding the
 6 average number of days Plaintiff was likely to miss work over any given period.
 7 The regulations generally describe a moderate limitation as meaning the claimant
 8 has a “fair” ability to function in that area “independently, appropriately,
 9 effectively, and on a sustained basis.”¹²⁸ Still, “a moderate impairment is not the
 10 same as no impairment at all. . . .”¹²⁹ And the Commissioner has recognized that
 11 moderate limitations can sometimes result in disability, so they must be accounted
 12 for in the claimant’s RFC and addressed at steps four and five.¹³⁰ After all, “the

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 14 ¹²⁷ AR 243.

15 ¹²⁸ See, e.g., Listing 12.00F (describing use of a rating scale with paragraph B
 16 criteria in evaluating mental disorders).

17 ¹²⁹ *Haga v. Astrue*, 482 F.3d 1205, 1208 (10th Cir. 2007). But cf. *Pavlicek v. Saul*,
 18 994 F.3d 777, 783 (7th Cir. 2021) (“[F]air’ in ordinary usage does not mean ‘bad’ or
 19 ‘inadequate.’ So a ‘moderate’ limitation in performing at a consistent pace seems
 20 consistent with the ability to perform simple, repetitive tasks at a consistent
 21 pace.”).

22 ¹³⁰ See 81 FR 66138-01, *66147, *Revised Medical Criteria for Evaluating Mental*
 23 *Disorders*, 2016 WL 5341732.

1 spectrum of limitation that may constitute ‘moderate’ limitation ranges from
2 limitations that may be close to “marked” in severity to limitations that may be
3 close to the ‘mild’ level.”¹³¹

4 The ALJ assigned substantial weight to Dr. Metoyer’s opinion as well as
5 Dr. Haney’s opinion.¹³² Those doctors’ opinions, Plaintiff’s symptom reports, and
6 the rest of the record all indicate that Plaintiff’s impairments would cause her at
7 least some difficulty in maintaining attendance at work on a sustained basis.
8 However, without providing any explanation, the ALJ declined to include any such
9 limitation when crafting Plaintiff’s RFC and/or when conducting the step-four and
10 step-five analyses. Without more, the Court cannot conclude that substantial
11 evidence supports the ALJ’s implicit finding that Plaintiff’s impairments would not
12 cause any significant issues with her attendance and ability to maintain
13 employment. On remand, the ALJ is instructed to make specific findings,
14 supported by detailed explanations and citations to substantial evidence, regarding
15 Plaintiff’s likely average absenteeism rate.

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22 ¹³¹ See 81 FR 66138-01, *66147, 2016 WL 5341732.

23 ¹³² AR 78.

V. CONCLUSION

The Court reverses the decision of the ALJ. Because the Court finds the record does not clearly establish that Plaintiff is entitled to benefits, the Court remands this case for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g).¹³³

On remand, the Commissioner shall instruct the ALJ to reevaluate Plaintiff's disability claims as set forth above, starting at step two of the sequential evaluation process. The ALJ is to give particular consideration on remand to Plaintiff's symptom reports and the medical opinions regarding Plaintiff's likely average absenteeism rate, and the ALJ shall provide a detailed explanation for how such evidence was considered in crafting Plaintiff's RFC and in reaching an ultimate determination.

Accordingly, IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment, ECF No. 27, is

GRANTED.

2. The Commissioner's Motion for Summary Judgment, ECF No. 31, is

DENIED.

¹³³ See *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)). *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”).

3. The decision of the ALJ is **REVERSED**, and this matter is
REMANDED for further proceedings consistent with this order.

4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff.

5. The case shall be **CLOSED**.

IT IS SO ORDERED. The Clerk's Office is directed to file this Order and provide copies to all counsel.

DATED this 15th day of March 2022.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge